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7 JOHN CASTRO,  
8 Plaintiff,  
9 v.  
10 JOHN DOE,  
11 Defendant.

Case No. [23-mc-80198-YGR \(TSH\)](#)

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**REPORT & RECOMMENDATION RE:  
MOTION TO COMPEL**

Re: Dkt. No. 1

20 This matter has been referred to the undersigned to prepare a report and recommendation  
21 regarding John Castro's motion to compel compliance with a subpoena issued in *J.A. Castro v.*  
22 *John Doe I, et al.*, Case No. 4:23-cv-613-P (the "Texas action"), a defamation case pending in the  
23 United States District Court for the Northern District of Texas. ECF No. 1. Non-party Wikimedia  
24 Foundation, Inc., which was served with the subpoena, and John Doe 1, the defendant in the Texas  
25 action who is the target of the subpoena, have both filed oppositions. ECF Nos. 3, 7. Castro filed  
26 a reply. ECF No. 11.

27 A party may not seek discovery from any source before the parties have met and conferred  
28 pursuant to Federal Rule of Civil Procedure 26(f) except in a proceeding exempted from initial  
disclosure under Rule 26(a)(1)(B), or when authorized by the Federal Rules of Civil Procedure, by  
stipulation, or by court order. *See Fed. R. Civ. P. 26(d)(1).* A court may authorize early  
discovery, for example, to serve a third-party subpoena to learn the identity of a Doe defendant.  
*See Mary Kay Inc. v. Beyou-Cosms. storefront on www.eBay.com*, 2021 WL 2315097, at \*1 (N.D.  
Tex. June 7, 2021); *UMG Recording, Inc. v. Doe*, 2008 WL 4104214, \*4 (N.D. Cal. Sep. 3, 2008);  
*Arista Records LLC v. Does 1-19*, 551 F. Supp. 2d 1, 6-7 (D.D.C. 2008). Although the Federal  
Rules do not provide a standard for granting authorization for early discovery, the Northern

1 District of Texas applies a “good cause” standard. *See Mary Kay Inc.*, 2021 WL 2315097, at \*1  
2 (citing *Talon Transaction Techs., Inc. v. Stoneeagle Servs., Inc.*, 2013 WL 12172925, at \*2 (N.D.  
3 Tex. May 14, 2013)).

4 A review of the docket in the Texas action contains no indication that the Defendants have  
5 been served, much less that there has been a meet and confer under Rule 26(f). The Texas action  
6 is not exempted from initial disclosure, the Federal Rules do not authorize this early discovery  
7 without a court order, and a review of the docket in the Texas action does not disclose any order  
8 authorizing early discovery. Further, Castro has presented no evidence that the parties entered into  
9 a stipulation for such discovery.

10 In light of this, the Court ordered Castro to submit additional briefing to explain why his  
11 subpoena is not barred by Rule 26(d)(1). He filed a response at ECF No. 24 that makes two  
12 arguments. First, Castro argues that the bar on early discovery in Rule 26(d)(1) is inapplicable  
13 because this proceeding to enforce his subpoena is exempted from initial disclosure by Rule  
14 26(a)(1)(B). It’s true that initial disclosures are not required in an ancillary proceeding to enforce  
15 a subpoena issued in an underlying case that is pending in another district, but initial disclosures  
16 are required in the underlying case in the other district, the subpoena here is an attempt to take  
17 discovery in that underlying case, and the underlying case is where the bar on early discovery  
18 “from any source” applies.

19 Second, Castro argues that the placement of Rule 45 in Title VI of the Federal Rules  
20 (entitled “TRIALS”), as opposed to Title V (entitled “DISCLOSURES AND DISCOVERY”)  
21 means that subpoenas are not a form of discovery. However, that is wrong too. Subpoenas under  
22 Rule 45 can compel attendance at a hearing or trial, or they can be a form of discovery. Adv.  
23 Comm. Notes, 1937 Adoption (“This rule applies to subpoenas ad testificandum and duces tecum  
24 issued by the district courts for attendance at a hearing or a trial, or to take depositions). The  
25 Advisory Committee Notes repeatedly refer to subpoenas’ function as a tool of discovery. *See*,  
26 e.g., Adv. Comm. Notes, 2006 Amend. (“Rule 45 is amended to conform the provisions for  
27 subpoenas to changes in other discovery rules, largely related to discovery of electronically stored  
28 information.”); Adv. Comm. Notes, 2007 Amend. (“The reference to discovery of ‘books’ in

1 former Rule 45(a)(1)(C) was deleted to achieve consistent expression throughout the discovery  
2 rules.”). Here, the subpoena Castro served is a form of discovery, as it seeks to compel  
3 Wikimedia to produce documents or information. *See* ECF No. 1. As none of the exceptions in  
4 Rule 26(d)(1) apply, the subpoena is premature.

5 The undersigned therefore **RECOMMENDS** the motion to compel be **DENIED** without  
6 prejudice to Castro’s seeking leave from the Northern District of Texas to conduct early discovery.

7 Pursuant to Federal Rule of Civil Procedure 72, any party may serve and file objections to  
8 this Report and Recommendation within 14 days after being served. Failure to file objections  
9 within the specified time may waive the right to appeal the district court’s order.

10 **IT IS SO RECOMMENDED.**

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12 Dated: September 14, 2023

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14 THOMAS S. HIXSON  
United States Magistrate Judge

United States District Court  
Northern District of California